

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT MOSHI (CORAM: WAMBALI. J.A.. KITUSI. 3.A.
And NGWEMBE. J.A.1 CRIMINAL APPEAL NO. 60 OF 2021 EVARIST
AROBOGAST.....APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT (Appeal from the Decision
of the High Court of Tanzania at Moshi) (Mutunai, dated the 11th day of December, 2020 in DC.
Criminal Appeal No. 34 of 2020 JUDGEMENT OF THE COURT 8th & 10th May, 2024 KITUSI. JA.:
Before the District Court of Rombo at Rombo, Evarist Arobogast, the appellant was charged with
unnatural offence contrary to section 154 (1)

- (a) of the Penal Code allegedly for having had carnal knowledge of a boy aged 7 years, against the order of nature. At the conclusion of the trial proceedings, though no conviction was entered, the learned Resident Magistrate sentenced the appellant to life imprisonment. Appellant's appeal to the High Court, Criminal Appeal No. 39 of 2015 before Fikirini, 1 (as she then was), was on 31/3/2016, partly successful in that the learned Judge noted that the trial court had not entered a conviction in compliance with section 235 (1) of the Criminal Procedure Act (CPA), so she ordered the record to be remitted for the trial court to prepare and deliver judgment in accordance with that provision. What the learned magistrate did in her purported compliance with the order of Fikirini, J. has left a lot to be desired and has become subject of our instant decision. The original judgment which had inadvertently omitted to enter conviction was dated 18th November, 2014 and it is at pages 72 (a) to 72 (i) of the record of appeal. There is however, another judgment from page 28 to page 36 composed by the same magistrate, bearing the same date as the original judgment. The two judgments are almost identical except that in the one at pages 28 to 36 there is a sentence that runs: 7 hereby convict the accused person (sic) from the offence charged " We adjourned hearing initially to see if we could land on better records to enable us disentangle from the dilemma, but none was forthcoming. Ms. Grace Madikenya, learned State Attorney who was being assisted by Mr. Philbert Mashurano shared our frustration and dilemma and submitted that the best that could be done in the circumstances, is to nullify the two judgments of the trial court and order that a fresh judgment be composed in compliance with the order of Fikirini, J. We have also noted another disturbing feature in the record of appeal, in that there is no indication as to when the second judgment of the trial court was read over to the appellant before he raised a notice of appeal dated 20/6/2019 to the High Court. His second appeal

before the High Court which was registered as Criminal Appeal No. 34 of 2020 was placed before Mutungi, J. who dismissed it on 11/12/2020. That decision is the subject of the instant appeal. It is however relevant to note here that the record of appeal placed before us, leaves so much to speculation as to what happened between the date of the order of Fikirini, J on 31/3/2016 to 20/6/2019 when the notice of appeal, conveniently omitting some relevant information, was lodged. Addressing the identified anomalies, the appellant emphasized that all this is a result of no fault of his and prayed that we should make orders meant at sparing him from more suffering in prison. With respect, while we agree that the appellant is not the architect of the anomalies, it is always our duty to ensure that proceedings are conducted in accordance with the law and established principles. In this case, can we just wish away the anomalies at the altar of doing justice to the appellant. In our view, there is no easy way to right these wrongs but to do what Ms. Madikenya has suggested. We have previously pronounced ourselves regarding our duty of ensuring proper application of the laws, and we wish to repeat. In *M/s. Anjari Soda Factory Limited v. Joseph Tulo Shembilu & 3 Others*, (Civil Appeal No. 572 of 2022) [2023] TZCA 17293 (2 June 2023, TANZLII), the Court reproduced a paragraph from *Adelina Koku Anita & Another v. Byarugaba Alex*, Civil Appeal No. 46 of 2019

[2019] TZCA 416 (4 December 2019, TANZLII), that: "It is certain therefore that where the lower court may have not observed the demands of any particular provision of law in a case, the court cannot justifiably close its eyes on such glaring illegality because it has a duty to ensure proper application of the laws by the subordinate courts and/or tribunals:" See also *National Microfinance Bank v. Leila Mringo & 2 Others* (Civil Appeal No. 30 of 2018) [2020] TZCA 240 (20 May 2020, TANZLII). Before we take leave, we emphasize the fact that sanctity of court records must never be compromised to maintain people's confidence in our justice system. Having said so, we now do the following: first we quash the two judgments of the District Court of Rombo both dated 18th November, 2014 and set aside their orders. We also nullify the proceedings and quash the judgment of Mutungi, J. dated 11/12/2020 in Criminal Appeal No. 34 of 2020, for having entertained an appeal from irregular proceedings. Lastly, we remit the record in Criminal Case No. 68 of 2014 to the trial District Court and direct another Magistrate with competent jurisdiction to comply with the order of Fikirini, J. in accordance with the law, as soon as possible within 60 days of delivery of this order. Meanwhile the appellant to remain in custody. DATED at MOSHI this 10th day of May, 2024. F. L. K. WAMBALI JUSTICE OF APPEAL I. P. KITUSI JUSTICE OF APPEAL P. J. NGWEMBE JUSTICE OF APPEAL Judgment delivered this 10th day of May, 2024 in the presence of the Appellant in person and Ms. Julieth Komba, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. 5

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